

“So many legislative changes with such little impact” – a gender analysis of labour reform

ROSELINE NYMAN

Director

NADEL Human Rights Research and Advocacy Project

1 INTRODUCTION

Equality, equity and affirmative action are each “catch all” phrases that aim to redress political, social and economic imbalances that result from discrimination. Various groups of people experience discrimination; black people, women, black women, children, people with disabilities, poor people, gays and lesbians. Many forms of discrimination cannot easily be separated into different categories because they are interconnected. For example, a black domestic worker could experience racism, sexism and economic exploitation at the same time.

South African labour and social security legislation have undergone considerable change. The Basic Conditions of Employment Act,¹ Labour Relations Act² and the Employment Equity Act have introduced many new provisions.³ These legislative reforms form part of the Department of Labour’s five-year programme of labour law reform that includes as its aims giving and extending worker rights, addressing the perceived rigidities of the labour market and promoting “regulated flexibility”. Many aspects of this programme coincide with government’s macro-economic strategy as set out in the Growth Employment and Reconstruction (GEAR) document. The Congress of South African Trade Unions (COSATU) has, however, already criticised GEAR for not advocating socio-economic reforms that will benefit the poor, for example job creation and social security benefits.

This article examines women’s status in the labour market as a category of people who experience discrimination. The paper, firstly, provides an overview of constitutional rights that have a special impact on women. Secondly, it addresses obstacles experienced by women at the workplace. Finally, it examines the Basic Conditions of Employment Act and the Employment Equity Act.

1 75 of 1997 and coming into operation on 1 December 1998.

2 66 of 1995.

3 55 of 1998.

2 OVERVIEW OF CONSTITUTIONAL RIGHTS

The Constitution forms the cornerstone of our young democracy. Both on a political and socio-economic level, the rights enshrined in the Constitution represent a victory for South Africans against apartheid. The equality provision guarantees gender equality, the anti-discrimination clause prohibits direct and indirect discrimination and the affirmative action provision allows for the implementation of affirmative action programmes. Socio-economic rights such as housing, education, health care, food, water and social security, are significant for black women who constitute the most impoverished grouping. These rights concern women as workers, mothers and unemployed South Africans standing in the unemployment queue. While government, through its legislative reform process, is in a strong position to eradicate direct discrimination, the eradication of indirect discrimination and the creation of equality in the social and economic sphere is not an easy task. Nevertheless, the establishment of the Human Rights Commission and the Commission on Gender Equality, combined with the ratification of the United Nation's Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW),⁴ indicate a government commitment to eliminate gender discrimination. These international instruments provide an enabling environment for gender-sensitive labour law reform.

3 WOMEN'S OBSTACLES IN THE LABOUR MARKET

Women workers' long-standing struggle against exploitative and oppressive working conditions have set the legislative reform agenda. Through their day-to-day struggles women have brought to the fore obstacles in the labour market. This is the case with both private and public sector workers. The gains made by women through the legislative reform process are minimal as most women workers continue to face obstacles on the shopfloor. Such obstacles include low wages, wage discrimination, the sectoral concentration of women in "typical female jobs", sexual harassment, inadequate childcare facilities, maternity benefits and in-house training.⁵

It is gratifying to observe that the Constitutional Court in the seminal case of *President of the Republic of South Africa and Another v Hugo*⁶ recognised some of the primary obstacles experienced by women workers. In a well-argued judgement the Court stated that:

"For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt the task of rearing children is a burdensome one. It requires money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder

4 NIPILAR 1995.

5 Nyman and Caga 1996.

6 1997 6 BCLR 708 (CC).

their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of deep inequalities experienced by women in employment.”⁷

A growing trend in the labour market is the division between, on the one hand, a core of permanent workers who enjoy job security and benefits and, on the other hand, a periphery of part-time, casual, temporary and sub-contracted workers. Women are especially located in the self-employed and informal sectors, and they also make up the vast majority in the domestic and small business sectors.

4 BASIC CONDITIONS OF EMPLOYMENT ACT

Some of the more significant provisions of the Basic Conditions of Employment Act (BCEA) will now be examined. The BCEA is a product of lengthy negotiations between government, trade unions and employers at the National Economic Development and Labour Council (NEDLAC), and the public hearings conducted by the Portfolio Committee on Labour. As is usual on the South African labour relations landscape, these talks were interspersed with mass action by thousands of workers in support of COSATU’s demands.

The BCEA lays down a minimum floor of rights for workers. These rights include, *inter alia*, annual leave, sick leave, maternity leave and maximum working hours. The Act also incorporates sectoral employment standards (former wage determinations) that were previously regulated by the Wage Act.

The BCEA is significant for women as it provides for basic working conditions with which employers are obliged to comply. Women workers in particular benefit from the BCEA because many of them are not unionised and consequently do not enjoy an improvement in their working conditions through collective bargaining. They are often located in sectors that are difficult to organise: the informal sector, non-standard employment (part-time, casual and temporary work, piecework and contract-work), domestic work and farm work. Women are also concentrated in low-paid and unskilled jobs. Black women especially need legislative protection, as they are the most vulnerable grouping of workers. Therefore, for the vast majority of women, minimum standards become maximum standards. This section examines those provisions in the BCEA which impact most directly on women workers.

4.1 Scope of the Act

Probably the most progressive aspect of the BCEA is the extension of key provisions to all workers. Domestic workers are now entitled to sick leave and annual leave. The Minister’s power to make sectoral determinations establishing basic conditions of employment have been extended to farm

7 7271-728B.

workers and domestic workers. However, an employer who employs fewer than five employees, or an employer who employs a domestic worker, is excluded from certain obligations regarding particulars of employment, keeping of records and information about remuneration.⁸

While more workers now enjoy rights concerning basic conditions of employment, not many of them know their rights. A beneficial change is an employer's obligation to display at the workplace a statement of workers' rights. A concern is that the BCEA stipulates that these rights should be displayed in the official language which is spoken at the workplace. The official language is generally the language that is spoken by the employer; in most cases English or Afrikaans. It would be preferable if this document is drafted in workers' first language.

4.2 Maternity benefits

COSATU's long-standing demand of six months maternity leave on full pay was a main issue of disagreement at NEDLAC during the 1997 negotiations. The maximum period of maternity leave has now been increased from three to four months.⁹ A disadvantage to women taking the full four months maternity leave is that the Unemployment Insurance Act¹⁰ only allows for the payment of 45% of a worker's wage as maternity benefits.

The BCEA introduces greater flexibility with respect to maternity leave. While provision is made for a female employee to commence maternity leave at any time from 4 weeks before the expected date of birth – this period can be varied in accordance with medical certification. The BCEA also stipulates that an employee may not work for 6 weeks after the birth of her child unless a doctor or midwife certifies that she is fit to do so. This flexibility is a double-edged sword. On the one hand it undermines the commitment to compulsory minimum standards as workers can always be pressurised to obtain a medical certificate. On the other hand, this flexibility is in the interest of the worker as she can exercise the choice regarding the period of maternity leave.

A provision that encourages the establishment of an environment that accommodates women is found in the obligation on employers to take into account the health and safety of pregnant women by allowing them to be transferred to jobs which are less hazardous to their health. In line with this provision, a night worker should have the right to be transferred to day work during pregnancy and a year after delivery.¹¹

4.3 Family responsibility leave

A landmark introduction is three days paid family responsibility leave during each annual leave cycle to which an employee is entitled when a

8 S 28.

9 S 25.

10 30 of 1966.

11 S 26.

child is born or when a child is sick.¹² Both mothers and fathers¹³ are entitled to this leave. While three days is a short period, its ideological impact cannot be overstated. This is a good example of legal activism in that men are encouraged to play an active role in child care responsibilities. Law can contribute to the evolution of an environment that will facilitate a change in consciousness. Thus family responsibility leave offers fathers the opportunity to exercise the choice to share the parenting load.

Family responsibility leave is a significant contribution to working mothers combining work career with family responsibilities. In the past women had to obtain time off from employers to look after their sick children. Permission for time off was within the discretion of the employer and even though it was unpaid, employers often withheld authorisation. This situation frequently resulted in low morale and absenteeism. COSATU proposed twelve days paid family responsibility leave per year.

4.4 Downward variation

Undoubtedly, the most flawed aspect of the BCEA is the Minister's discretionary power to replace or exclude any basic conditions of employment in respect of any employees or employers.¹⁴ This means even though the legislation is aimed at providing minimum protection to workers, employers may undermine these minimum standards merely by making an application to the Minister for variation. This provision is aimed at promoting "regulated flexibility" in the labour market as spelt out in the Department of Labour's five year programme of labour law reform.

The Act excludes prohibitions on forced and child labour from the ambit of such variation. However, it fails to include maternity leave and family responsibilities from the list of exclusions even though such downward variation will have a special impact on female workers who are normally more vulnerable. Unorganised workers do not have the same power as unionised workers to resist variation to minimum standards.

Clearly, downward variation will make it easier for employers to bypass minimum standards. The Minister's power to exclude large sectors of workers from protection will increase differences in working conditions between various categories of workers. The employers' argument that minimum standards for domestic workers could result in job loss has the potential effect that domestic workers could ultimately be excluded.

4.5 Wages

The BCEA empowers the Minister to make a sectoral determination establishing basic conditions of employment for employees in a sector and area.¹⁵ In order to do so the Minister must first establish the Employment

12 S 27.

13 Family responsibility leave also applies to the death of the employee's spouse or life partner. See s 27(2).

14 S 50.

15 S 51.

Conditions Commission (ECC). An important aspect of this provision is that the Minister must consult with NEDLAC concerning the appointment of three persons on the ECC who are “knowledgeable about the labour market conditions of employment, including the conditions of employment of vulnerable and unorganised workers”.¹⁶ Such an addition will have a beneficial impact on women workers as it will ensure that ECC members make informed decisions concerning their working conditions.

Sectoral employment standards have a critical potential of improving the working conditions of domestic workers and farm workers. It is trite that workers in these sectors constitute the lowest-paid workers. Over 80% of domestic workers earn below R500,00 per month while 18,1% earn below R150,00.¹⁷ Sectoral minimum wages could thus result in wage increases for a significant number of women workers.

The ECC performs a predominantly advisory role to the Minister concerning sectoral determinations and basic conditions of employment.¹⁸ The ECC also has a critical function of advising the Minister in setting minimum wages to prevent unacceptably low wages being set for unorganised workers. The ECC has the potential to ensure public participation regarding its functions as the BCEA empowers it to hold public hearings.¹⁹ Women workers could thus use the opportunity to make submissions regarding their working conditions.

5 EMPLOYMENT EQUITY ACT

The Employment Equity Act’s primary aim is to achieve workplace equity and thus forms an important framework for the eradication of sex discrimination. Employment equity comprises two aspects: firstly, the prohibition of unfair discrimination and, secondly, affirmative action. While unfair discrimination includes all forms of discrimination listed in the Constitution,²⁰ affirmative action measures encompass three designated groups; black people, women and people with disabilities. An employer has the responsibility “of promoting equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”.²¹

5.1 Prohibition of harassment

The Act prohibits harassment as a form of unfair discrimination on any of the above-stated grounds. While the Act does not define harassment, the Employment Equity Green Paper defined harassment as “unwanted or unsolicited attention based on someone’s personal characteristics”. The

16 S 60(1).

17 Nyman and Caga 1996.

18 S 59(2).

19 S 61.

20 The grounds include but are not limited to race, gender, sex, pregnancy and marital status.

21 S 5.

Green Paper listed hate speech and sexual harassment as examples of harassment. The Green Paper placed an obligation on employers to review grievance procedures to ensure they deal with harassment complaints sensitively and effectively.

While a general prohibition of harassment is welcomed, it is problematic that the Act does not include sexual harassment as a specific form of harassment on the job. Sexual harassment is a particular form of harassment directed predominantly at women that requires special policies and procedures. For example, COSATU's Sexual Harassment Code of Conduct and Procedure provides special procedures for sexual harassment cases. It defines sexual harassment as "any unwanted or unwelcome conduct of a sexual nature or other conduct based on sex which causes discomfort to the victim". This can include unwelcome physical, verbal or non-verbal conduct.

The difference between sexual harassment and other forms of harassment is the highly sexual nature of the conduct that goes beyond "personal characteristics". A concern is that sexual harassment, as a major obstacle facing women at the workplace, will dissipate in the general harassment complaints. It is therefore encouraging that NEDLAC has recently concluded a Sexual Harassment Code of Practice and Procedure. The Code will be incorporated in the Labour Relations Act as a Code of Good Practice.²²

5.2 Employment policy or practice

A positive aspect of the Act is that it does not provide an exhaustive list of employment policies or practices such as recruitment procedures, appointments, job classifications and grading and remuneration.²³ Because these policies and practices are "gender neutral" women workers would have to identify unfair discrimination regarding each aspect of the employers' policies and practices.

As the Act does not define unfair discrimination, it will be left to the courts to interpret what labour policy or practice constitutes unfair discrimination on a case-by-case basis. However, the Act, in line with the Constitution, excludes affirmative action measures and the exclusion or preference of any person on the basis of "an inherent job requirement" from the ambit of unfair discrimination. Our courts have already had the opportunity to elucidate the meaning of unfair discrimination.²⁴ No doubt the Commission for Mediation, Conciliation and Arbitration and the Labour Court which are charged with adjudicating matters that arise from the Act, will follow precedents created in the higher courts. Nevertheless, judicial officers will still have a wide discretion to determine whether a labour policy or practice constitutes unfair discrimination.

22 Since incorporated as an annexure to the LRA.

23 S 1.

24 See *Public Servants Association of South Africa and Another v Minister of Justice and Others* 1997 5 BCLR 577 (T).

5.3 Recruitment procedures and selection

The Act prohibits employers from using recruitment and selection criteria that discriminate unfairly.²⁵ Advertising constitutes an important step in the recruitment procedure. Although the Act is silent on the advertising procedures, the Employment Equity Green Paper stipulated the following guidelines:

- the development of advertising mechanisms that reach all realistic candidates for new opportunities, including people from historically disadvantaged groups;
- ending mechanisms that neglect historically disadvantaged groups, e.g. newspapers and institutions with limited audience; and
- avoiding word-of-mouth recruitment that favours members of historically privileged groups.

The Green Paper furthermore suggested criteria that involved firstly, redefining existing criteria and secondly, transforming work and training. Redefining criteria is aimed at avoiding higher hurdles that the current organisation of work and training legitimately require and include:

- reviewing existing criteria so that they centre on selecting people who can do the job under normal conditions;
- where possible, criteria should be based on skills and experience rather than formal education;
- seniority may be discriminatory where the company has historically employed few people from historically disadvantaged groups; and
- a language policy must be a genuine job requirement otherwise it could be discriminatory.

Recruitment and selection criteria have proven to be controversial in the implementation of affirmative action programmes. Many white workers have raised concerns about being overlooked in favour of black candidates even though they are more experienced, skilled or educated. To allay these fears, the Act stipulates that “nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued advancement of people who are not from designated groups”. The Act furthermore encourages employers to “retain and develop people from designated groups and to implement appropriate training measures”.²⁶

A highly contested High Court case was the *Public Servants Association of South Africa and Another v Minister of Justice and Others*.²⁷ The Public Servants Association of South Africa (PSA), an employees' organisation representing various employees in the Ministry of Justice and the State Attorney's offices, opposed the filling of 30 posts in the offices of the State Attorney in Durban, Cape Town, Port Elizabeth, Bloemfontein, Johannesburg and Pretoria. The respondent had advertised the posts in various

25 S 1.

26 S 15(2)(d).

27 1997 5 BCLR 577 (T).

newspapers. The advertisement indicated that the public service was an affirmative action employer and that the filling of the positions was meant to promote representation in the public service and preference would be given to those job applicants whose transfer, promotion or appointment would contribute to this aim. The second applicant and other members of the PSA, all white males, applied for the relevant posts. They were not interviewed for the posts and were thus not appointed. Only three women from the office of the state attorney were invited to attend interviews. They were less experienced and qualified than the second applicant and other members of the PSA who applied for the positions.

The Court held firstly, that the second applicant and other members of the PSA who had applied for the positions were discriminated against because they were not considered for promotion as they were white males and, secondly, because the respondent had not dispensed with the onus of proving that the discrimination was fair, such discrimination constituted unfair discrimination. In the motivation for the judgement, the Court found that section 212(2) of the interim Constitution that has the aim of promoting a broadly representative public administration should not be read in isolation from the preceding clause that calls for the promotion of an "efficient public administration". Respondent's affirmative action programme thus also has to take merit into account. Such an affirmative action programme could be acceptable in the instance where in the promotion of black candidates, where blacks and whites have the same qualifications and merit, "on a properly controlled and rational basis, representivity will be promoted but not at the cost of efficiency".

Even though the case pertains to public sector workers, it is an indication of how the courts could approach affirmative action programmes in the labour market. A lesson from the case is that employers have to strike a balance between adequate representivity from designated groups and adequate qualifications for the job.

A critical feature of recruitment and training is the composition of the selection body. It was encouraging that the Green Paper recommended that, where possible, selection bodies should include representatives from historically disadvantaged groups, if necessary, invited from outside the organisation. This was in line with the objective of increasing the democratisation of the workplace. It is thus disappointing that the Act does not make reference to the selection body. Such an omission reinforces management's prerogative to constitute the selection body.

While gender discrimination in respect of hiring is a serious obstacle for many women, this has to be coupled with the lack of job opportunities in the labour market. Women's high unemployment rate means that they are competing with men for the few jobs that are created. Thus an elimination of discrimination in hiring on its own will not address women's high unemployment rate.

5.4 Child care

Well-known obstacles facing women in the labour market are low wages, inadequate maternity and paternity benefits, lack of childcare facilities,

sexual harassment and lack of recruitment and promotion opportunities. This section identifies child care and low wages as two issues that are not adequately covered by present legislation and examines to what extent the Employment Equity Act addresses these issues.

Women's primary responsibility for child care continues to be an obstacle at the workplace. As an increasing number of women enter the labour market, the tension between work and family responsibilities remains unresolved. On the one hand, society continues to view child care as women's responsibility and does not facilitate the equal participation of men, while on the other hand, most employers do not provide working conditions that accommodate working mothers. Working class women are especially affected. Low wages make it more difficult for them to choose part-time work so that they have more time for family responsibilities. Furthermore, the dire shortage of childcare facilities affects their work performance. Research has revealed that women workers' concerns regarding child care contribute to sick leave and absenteeism.²⁸ Although the trade union movement has a long-standing campaign concerning the provision of child care facilities at the workplace, it has not succeeded in placing child care on the collective bargaining agenda. The Act requires an employer to take steps to eliminate unfair discrimination regarding the working environment and facilities. Would the lack of child care facilities at the workplace constitute unfair discrimination against mothers who are responsible for child care?

The Constitutional Court has held that there are two separate enquiries to determine unfair discrimination; firstly, whether the policy or practice is discriminatory and, secondly, whether the impact of that discrimination is unfair.²⁹ In *Prinsloo v Van der Linde*³⁰ the Constitutional Court defined discrimination as "treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity".³¹ Whether such discrimination is fair is to be judged in the light of the particular circumstances of the context. In general, actions will be regarded as unfair where the discrimination "serves no intelligible purpose or is unreasonable or if the discrimination is based on immutable human characteristics".³² The court has to determine whether the impact of the discriminatory action is one which furthers the goal of equality or not.

In the *President of the Republic of South Africa and Another v Hugo*³³ the Constitutional Court had to decide whether a special remission granted only to mothers in prison with minor children under the age of 12 was

28 Naidoo *et al* 1996.

29 *Harksen v Lane NO and Others* 1997 11 BCLR 1489 (CC), *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 (CC).

30 1997 6 BCLR 759 (CC).

31 773C-E.

32 *Chirach Tyre Co (Pty) Ltd v Minister of Trade and Industry and Another* 1997 3 BCLR 319 (T).

33 1997 6 BCLR 708 (CC).

constitutional. The facts of the case are that in terms of the Presidential Act,³⁴ as an exercise of the President's powers under section 82(1)(k) of the interim Constitution, a special remission was granted to certain categories of prisoners for the remainder of their sentences. One such category was "all mothers in prison on 10 May 1994 with minor children under the age of 12 years". Respondent, a widower and the father of a son who was born on 11 December 1982, had successfully sought an order declaring the Presidential Act unconstitutional on the grounds that it discriminated unfairly against him on the basis of gender.

The Constitutional Court accepted the generalisation that women bear an unequal share of the burden of child rearing in our society in comparison to the burden borne by fathers. However, it cannot be said that it will ordinarily be fair to discriminate between women and men on that basis. The Court argued that it was not enough for the applicants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged. They must still show in the context of this particular case that the impact of the discrimination on the people discriminated against was unfair. The Court stressed the need to develop a concept of unfair discrimination which recognises that although society affords each human being equal treatment on the basis of equal worth and freedom as a goal, this goal cannot be achieved by insisting on identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether or not its overall impact is one which furthers the constitutional goal of equality. To determine whether that impact was unfair it is necessary to look not only at the group which has been disadvantaged but also at the nature of the power in terms of which the discrimination was effected and at the nature of the interests which have been affected by the discrimination. Taking into account that:

- male prisoners outnumber female prisoners;
- many fathers play only a secondary role in child rearing;
- the release of a large number of male prisoners in the current circumstances where crime has reached alarming levels would almost considerably have led to considerable public outcry;

the Court decided that the exclusion of male prisoners was not unconstitutional.

Although the facts of the case do not pertain to labour market equity directly, the Constitutional Court's analysis of the centrality of women's childcare responsibilities as a major impediment to women's improvement in the labour market is important. The case also constitutes a far-reaching precedent on how to evaluate an unfair discrimination claim regarding gender equality.

34 17 of 1994.

It seems that an employer would be protected from an unfair discrimination claim if he or she was only to pay a childcare subsidy to working mothers because women are predominantly responsible for childcare. However, can we use the *Hugo* judgement as a precedent to compel employers to provide childcare facilities at the workplace? A difficult factor to be determined is whether it is fair to expect an employer to contribute financially to childcare facilities at the workplace. To what extent does child care responsibilities have an impact on the working environment. Is it not the parents or state's responsibility to provide child care? Fortunately, a precedent exists in the provision of maternity benefits where the employer, the state and the worker contribute to the provision of maternity benefits. In the same manner employers and workers can contribute to the provision of childcare facilities at the workplace.

5.5 Affirmative action

The second aspect of employment equity is the obligation on designated employers to implement affirmative action measures for people from designated groups.³⁵ These measures are designed to remove unjustified barriers to employment for all South Africans and to accelerate training and promotion for individuals from historically disadvantaged groups. This aspect of employment equity falls within the ambit of the Constitution's "affirmative action" clause that protects measures aimed at achieving adequate advancement of persons disadvantaged by unfair discrimination.

A major shortcoming of the Act is that affirmative action only applies to "designated employers".³⁶ The Act defines a designated employer as:

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees but has a total annual turnover equal or above as stated in schedule 4.³⁷

This means that workers who have the misfortune of working for an employer who employs fewer than 50 employees with a low turnover will not benefit from employment equity. The exclusionary provision is a response to the small business sector who complained about the Act's financial impact. It is problematic that a substantial number of workers will be excluded from workplace change. Not all the Act's provisions have a financial impact. The Act does not place an obligation on employers to create new jobs; it only requires a more representative workforce regarding existing jobs.

It is disappointing that a substantial number of women who are a part of a designated group and who should benefit from employment equity, will be excluded. While the emphasis of the Act is the formulation of employment equity plans to bring about organisational change, such plans will be limited in substantially improving the conditions of the vast

35 S 13(1).

36 S 12.

37 S 1. A designated employer further includes a municipality, organ of the state and an employer bound by a collective agreement in terms of s 23 or 31 of the LRA.

majority of women workers. Firstly, women workers who are located in the vulnerable sectors, will not be covered by such plans. Secondly, most women workers are concentrated in unskilled jobs where their major concerns are low wages and poor working conditions. Affirmative action plans will predominantly benefit women in skilled and professional occupations.

Designated employers are required to implement the following affirmative action measures:

- measures to identify and eliminate employment barriers, including unfair discrimination;
- measures designed to further diversity in the workplace; and
- making reasonable accommodation for people from designated groups.

5.6 Duty to conduct an analysis

A designated employer's responsibility to conduct an analysis represents an indispensable tool in addressing areas for workplace change. It provides employers and workers with the necessary information to draft employment equity plans. The Act requires an employer to collect information and conduct an analysis of its employment policies, practices, procedures and the working environment in order to identify employment barriers which adversely affect people from designated groups. It is disconcerting that the analysis is substantially different from the "organisational audit" as originally suggested by the Employment Equity Green Paper. The Green Paper listed the following information to be included in the organisational audit:

- employment, pay and benefits by race, gender and disability;
- programmes and policies on human resource development;
- organisation of work in terms of skills and responsibilities;
- transport, housing and caring arrangements by race and gender;
- languages used and language competence;
- physical facilities for disabled people and women;
- procedures for hiring, training, promotion, retrenchment and transfers; and
- grievance and internal procedures.

It is not clear whether these measures would be included in the Act's analysis. It is suggested that they could serve as guidelines for the drafting of the analysis. The Act's analysis seems to emphasise the representivity of designated groups as the core component of organisational change while the Green Paper's approach was of a more comprehensive nature. A benchmark for disclosure of information was the fact that the employment conditions of a whole organisational hierarchy – from the worker to the director – will be subjected to scrutiny. Such information is necessary to establish the wage differentials between different categories of workers. As advanced by the Act, a designated employers' duty to consult with the union in conducting the analysis will ensure that the analysis is modified by the peculiarities of the particular workplace or sector. Workers' participation will contribute to a more comprehensive audit.

5.7 Employment equity plans

Employers' responsibility to draft employment equity plans is probably the most important feature of the Act's recommendations. Employment equity plans could be regarded as playing an essential role of a programme for workplace change. The Act requires that the plan includes, firstly, the objectives to be achieved for each plan and secondly,³⁸ the affirmative action measures to be implemented.

Where the analysis has identified the under-representation of people from designated groups, the employer has to implement numerical goals and targets to achieve their representation. Such representation must target each occupational category and level in the workforce. Employers thus need to establish a profile of employees by race, gender and disability identifying problem areas. An important qualification is that the people from designated groups must be "suitably" qualified. Such a plan must have clear time frames. The Act stipulates that it should not be shorter than one year or longer than five years.

An important aspect is the role of union representatives in the preparation and implementation of the employment equity plan. Employers have to undertake consultations and attempt to reach agreement with "a representative trade union" representing members at the workplace and its employees or representatives nominated by them.³⁹ Although the Act does not state that employers are required to "negotiate" with the union, the addition of an "attempt to reach agreement" is close enough to the meaning of "negotiation". This is to ensure that meaningful consultations take place between employers and unions.

The Green Paper recommended the establishment of a body that can represent all employees in the analysis and employment equity plan and where workplace forums exist, they will play this role. Workplace forums will play a meaningful role in the consultation process as the Act states that employers should continue to carry out its obligations regarding joint decision-making as required by the LRA.⁴⁰ An issue for joint decision-making that relates to the Act is the employers' obligation to consult with workplace forums concerning "measures designed to protect and advance persons disadvantaged by unfair discrimination".⁴¹

5.8 Wage discrimination

The Industrial Court has already determined that race-based wage discrimination constitutes an unfair labour practice.⁴² Pay differentials on the basis of gender also constitute unfair discrimination. However, in many cases unfair discrimination in respect of wages assumes more subtle forms as it is often hidden within the formal grading system.

38 S 20(2).

39 S 16.

40 16(3).

41 S 86(1)(c) LRA.

42 *South African Chemical Workers Union & Others v Sentrachem Ltd* (1988) ILJ 410.

The Act places an obligation on employers to evaluate their job classification and grading systems as part of their role to eliminate unfair discrimination.⁴³ This provision is a critical tool for removing obstacles to women's advancement because research has revealed that males located in typical male jobs, earn more than females located in typical female jobs, although they are on the same grades. For example, in the textile industry the jobs most filled by women are 30 percent lower than those filled by men. An explanation for this differentiation is that sewing is seen as a "natural female skill".⁴⁴ Employers are thus required to redefine grades to eliminate unequal pay and benefits where groups do virtually identical jobs. It is also necessary for employers and unions to amend the evaluation criteria for placing women in certain grades. One of COSATU's long-standing demands is broad banding (the reduction of grades) to make it easier for workers to move to higher grades.

Every designated employer is obliged to report to the ECC on the remuneration and benefits received in each occupational category and level of the employers' workforce.⁴⁵ A welcome provision is that where the said report reveals disproportionate income differentials, a designated employer must take measures to progressively reduce such differentials.⁴⁶ This constitutes a progressive step towards the elimination of wage discrimination as it places a positive obligation on employers to eradicate wage differentials. As the Act fails to define a "wage differential", the ECC must "research and investigate norms and benchmarks for proportionate income differentials" and advise the Minister accordingly.⁴⁷ This provision was introduced as a result of extensive negotiations at NEDLAC.⁴⁸ However, the definition of a wage differential is highly contested. As stated above, a sex-based wage differential regarding male and female workers who do the same job would constitute unfair discrimination. Unfair discrimination could comfortably form the basis for an equal pay for equal work claim. The complexity of sex-based wage discrimination which overlaps with race-based wage discrimination will not be easy for employers to address. Wage differentials exist between black and white women, women and men, black women and black men and black women and white men. These wage differentials are normally linked to occupations which are traditionally held both in private and public sector jobs.

Many jobs do not have comparable categories at the same workplace or industry. In order to claim unfair discrimination regarding a sex-based wage discrimination, a grievant would have to compare her job with a "comparable" male job category. For example, occupations of cleaners, domestic work and child minders are normally held by black women. These positions are low-paid because they are held by black women and a

43 S 1(c).

44 Budlender and Seidman-Makgetla 1995: 12.

45 S 27(1).

46 S 27(2).

47 S 27(4).

48 The draft report of the National Economic Development and Labour Council on the Employment Equity Bill, 18 April 1998.

lower value is placed on them in the service sector. Although these jobs could arguably be compared with gardeners, chauffeurs and security workers, jobs traditionally held by black men, a sex-based wage differential will not be successful as these jobs are also low-paid. Could a black female cleaner base her claim for a smaller wage differential on the "apartheid wage gap" by comparing her wages with that of a white manager at her work place or the white female secretary? In other words, could the existence of an "apartheid wage gap" constitute unfair discrimination. The "apartheid wage gap" refers to the pay differentials between skilled and unskilled workers who are predominantly black and management who are predominantly white. COSATU has consistently claimed in their submission to the Portfolio Committee on Labour that the "Act must address the issue of the apartheid wage gap if it is to have meaning for the millions of ordinary workers, who are the worst victims of apartheid legislation, who will not reach the upper echelons of the workforce, despite the affirmative action provisions of the legislation".⁴⁹ COSATU's demand is that the ratio of pay differentials should be reduced to 1:7.

Does COSATU's demand mean that the cleaner's job should be compared with that of the manager? It is clear that a manager's salary cannot be reduced, as it would constitute an unfair labour practice in terms of the Labour Relations Act, it follows, therefore, that the cleaner's wages would have to be increased to a reasonable wage. It is trite that black workers have experienced discrimination in the labour market because of race and gender. They were excluded from management positions and were generally compelled to hold unskilled positions in the labour market. While affirmative action has ensured that increasingly more black people are employed in management positions, it has not resulted in the improvement of the conditions of black workers in skilled and unskilled jobs. Such improvements are taking place as a result of collective bargaining.

While COSATU has been successful in ensuring that a reduction of the apartheid wage gap is addressed in the Act, a legislated national minimum wage would have a better result in increasing workers' wages. Organised and unorganised workers would benefit and enforcement would not depend on collective bargaining or on the submission of reports by designated employers. The uncertainty concerning what constitutes "disproportionate income differentials" will result in lengthy processes to reach agreement on the introduction of measures to reduce such income differentials. Furthermore, employers that employ fewer than 50 workers would also be covered by the minimum wage.

An issue that formed part of the Employment Equity Alliance's⁵⁰ submission to the Portfolio Committee on Labour was the recommendation that black women form a designated group. A concern is that black women are already overlooked in existing affirmative action programmes as employers predominantly employ black men and white women. Black

49 COSATU statement on the Employment Equity Bill, 21 August 1998.

50 An alliance comprising of various non-governmental organisations that was formed to make a joint submission on the Bill.

women constitute a discrete vulnerable group as they experienced both racism and sexism. The Constitutional Court has already taken cognisance of the position of black women. In *Brink v Kitshoff NO*⁵¹ O'Regan J stated that “[a]lthough in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender overlap”. In order to ensure that black women’s position is improved in the labour market, it is critical that their special plight is recognised by law.

6 CONCLUSION

The Constitution’s human rights framework which has triggered changes in labour laws, can contribute to an improvement of the working conditions of women workers. The extension of the BCEA and Wage Act to workers located in vulnerable sectors should provide protection to many women workers. Furthermore, an increase in maternity benefits and the introduction of family responsibility leave will assist many women and men to combine work and family responsibilities. The Employment Equity Act is an important stepping stone towards eliminating discrimination in the workplace. The legal obligation on employers to introduce employment equity plans will contribute to women’s struggle towards employment equity.

While legislative reform is essential for many women workers, a substantial number of them will not reap the benefits from such reforms. Their location in the vulnerable and unorganised sectors of the workforce places them out of reach of many of the legislative changes. As women make up a substantial number of the unemployed, legislative reform has to be coupled with a radical socio-economic programme that will lead to job creation. Furthermore, the limited success of a legislative reform programme depends substantially on whether women have the confidence to ensure compliance from employers. Their organisation in trade unions will place women workers in a better position to enforce existing standards and to improve the legislative minimum standards.

Sources

- Budlender D and Seidman-Makgetla N “Equal pay for equal work: issues and options” (1995) unpublished research paper Naledi Johannesburg
 COSATU “COSATU briefing paper”, (1997a) June 19 Johannesburg
 COSATU “Sexual Harassment Code of Conduct” (1997) COSATU Johannesburg
 Department of Labour *Employment and Occupational Equity: Policy Proposals* (1996) Green Paper Pretoria

51 1996 6 BCLR 752 (CC) 769 para 44.

- Naidoo R, Nyman R and Caga X "Starting early – a childcare provision framework for workers" (1996) research paper, Naledi Johannesburg
- National Institute for Public Interest Law and Research (NIPILAR) *The United Nations Convention on the Elimination of All Forms of Discrimination Against Women CEDAW in South Africa* (1995) NIPILAR Pretoria
- Nyman R and Caga Xolile "Women at work: a survey and recommendations on aspects of South African women's position in the workplace" (1996) research paper, Naledi Johannesburg
- Nyman R "The death of SADWU, the birth of a new organisation?" (1997) 21 *South African Labour Bulletin* 2
- O'Regan K and Thompson B *Equality for Women in Employment: An Inter-departmental Project* (1993) International Labour Organisation (ILO) Geneva
- Seidman N "Toward a statutory minimum wage" (1994) research paper, Naledi Johannesburg
- South African Labour Movement *Social Equity and Job Creation* (1996) issued by the Labour Caucus on the internet
- Taylor V "Economic gender injustice: the macro picture" (1997) *Agenda* 33